IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1747 OF 2004

Mubarak Hussain Shaikh ...Petitioner
Vs.
Sayeeda Mubarak Shaikh & Ors. ...Respondents

Mr Vijay Killedar for the Petitioner.
Mr A.H. Palekar for the Respondent Nos.1 and 2.
Ms M.H. Mhatre, A.P.P. for the State.

CORAM : A. S. OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : OCTOBER 13, 2005.

DATE ON WHICH JUDGMENT IS PRONOUNCED: NOVEMBER 18,2005

JUDGMENT:

1. Heard the Advocate appearing for the Petitioner, the Advocate appearing for the Respondent Nos.1 and 2 and the learned A.P.P. for the State. The Respondent Nos.1 and 2 filed an Application under section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) against the Petitioner for grant of monthly maintenance. The Respondent No.1 is the wife of the Petitioner and the Respondent No.2 is his daughter. The said Application was opposed by the Petitioner. The main ground of opposition was that the Petitioner has pronounced a legal and valid talaq and has thereby divorced the Respondent No.1. The contention raised by the Petitioner is that in view of the legal and valid talaq, the Application made by the Respondent No.1

under section 125 of the said Code was not maintainable. The learned Magistrate held that the Petitioner has pronounced legal and valid talaq and therefore, the Application filed by the Respondent No.1 should be treated as an Application under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the said Act of 1986). The learned Magistrate proceeded to direct the Petitioner to pay a lumpsum amount of Rs.01,50,000/- to the Respondent No.1 under the provisions of the said Act of 1986. The learned Judge also directed the Petitioner to pay sum of Rs.500/- per month to the Respondent No.2 by way of monthly maintenance under section 125 of the said Code. A Revision Application was preferred by the Petitioner for challenging the said order of the learned Magistrate. The Revision Application came to be dismissed by Judgment and Order dated 17th August, 2004. When this Writ Petition came up before the learned Single Judge of this Court (Shri Kanade, J) efforts were made to arrive at an amicable settlement between the parties. However, it appears that the parties could not resolve the dispute and therefore, the Petition was ordered to be placed before the regular Court.

2. The learned Counsel appearing for the

Petitioner submitted that the Application under section 125 of the said Code made by the Respondent No.1 could not have been treated as an Application under said Act of 1986. He has placed reliance on various decisions a reference to which is made at a later stage. He submitted that in any event, the amount fixed by the courts below is exorbitant. The Advocate appearing for the Respondent No.1 stated that the courts below were justified in treating the Application under section 125 of the said Code as an Application under the said Act of 1986. He submitted that no interference was called for in extra-ordinary jurisdiction under the Article 227 of the Constitution of India.

3. I have considered the submissions. It will be necessary to refer to the decision of Full Bench of this Court reported in 2000(3) Maharashtra Law Journal, Page 555 (Karim Abdul Rehman Shaikh Vs. Shehnaz Karim Shaikh). The Full Bench framed following questions for its considerations:

(i) Whether the Muslim husband’s liability under section 3(a) of the Muslim Women Act to make a reasonable and fair provision and pay maintenance is only restricted to the iddat

period or whether it extends beyond the iddat period?

(ii) Whether the Muslim Women Act has the effect of invalidating the orders/judgments passed under section 125 of the Code i.e. whether the Muslim Women Act operates retrospectively so as to divest parties of vested rights?

(iii) Whether after the commencement of the Muslim Women Act, a Muslim divorced wife can apply for maintenance by invoking the provisions of Chapter IX of the Code?

(iv) Whether the Family Court has jurisdiction to try applications of the Muslim divorced women for maintenance after the coming into force of the Muslim Women Act?

The Full Bench answered the said questions in the following manner:

Answer

i) The husband’s liability to pay maintenance to divorced wife ceases the moment iddat period

gets over. He has to pay maintenance to her within the iddat period for the iddat period. But he has to make reasonable and fair provision for her within iddat period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women Act. While deciding the amount regard will be had to the needs of the divorced women, the standard of life enjoyed by her during her marriage and the means of former husband and the like circumstances. If the husband is unable to arrange for such a lump sum payment he can ask for instalments and the Court shall consider granting him instalments. Till the husband makes the fair and reasonable provision, the Magistrate may direct monthly payment to be made to the wife even beyond the iddat period subject to the fixation of the amount of fair and reasonable provision.

ii) The orders passed under section 25 of the Code prior to the enactment of the Muslim Women Act are not nullified by reason of coming into force of the Muslim Women Act. Such orders are being binding on both sides and can be

executed under section 128 of the Code. The Muslim Women Act does not divest the divorced woman of the right to get maintenance under section 125 of the Code vested in her by reason of orders of the competent Court passed prior to its coming into force.

iii) After commencement of the Muslim Women Act, a Muslim divorced wife cannot apply for maintenance under the provisions of Chapter IX of the Code. It is only under section 5 of Muslim Women Act by agreement can the husband and the divorced wife approach a Magistrate under Chapter IX of the Code.

In paragraph No.64, the Full Bench proceeded to give following directions:

(a) All pending applications under section 125 of the Code filed by divorced Muslim Women pending after the commencement of the Muslim Women Act and will be disposed of as per the provisions of the said Act.

(b) All applications under section 125 of the Code filed by divorced Muslim Women which are

pending in the Family Court will be transferred to the concerned Magistrate's Court for disposal according to the provisions of the Muslim Women Act. Interim orders passed therein will be continued till the Magistrate disposes them of.

(c) All applications under section 125 of the Code filed by divorced Muslim Women, which have been decided finally pursuant to the decision of the Division Bench of this Court in Allabuksh's case (supra) will not be reopened due to the present judgment.

4. In the present case, the courts below came to the conclusion that valid talaq has been established. The learned Magistrate treated the Application as one under the provisions of the said Act of 1986. The perusal of the Judgment of the learned Magistrate shows that he has considered the monthly income of the Petitioner and has arrived at the quantum of maintenance. The learned Magistrate came to the conclusion that considering the basic necessity and requirements of the Respondent No.1 having regard to the earning capacity of the Petitioner, the Respondent No.1 was entitled to a lumpsum amount of

Rs.01,50,000/-. The maintenance payable to the Respondent No.2 who is the daughter of the Petitioner was fixed as Rs.500/- per month. As pointed out earlier, the Full Bench of this Court has held that husband of a divorced Muslim women has to make a reasonable and fair provision for her within iddat period which should take care of her for the rest of her life or till she incurs any disability under the said Act of 1986. The Petitioner is working as a policeman and is serving in Traffic Police Department. The learned Magistrate noted that his salary certificate showed his gross salary as Rs.5506/-. Considering the status of the Petitioner, it cannot be said that the sum of Rs.01,50,000/- fixed by the Courts below is unreasonable or arbitrary. Considering the needs of the Respondent No.1 and the standard of living enjoyed by her during the subsistence of marriage and income of the Petitioner, the amount of Rs.01,50,000/- has been fixed.

5. This is a Petition under Article 227 of the Constitution of India. It is well settled position of law that even assuming that the courts below have committed an error, unless it is established that there has been failure of justice at the hands of the courts below, interference is not justified. In this

case there is no failure of justice and therefore, I am not inclined to interfere with the impugned order only on the ground that the Respondent No.1 should have been driven to file another Application under the said Act of 1986 before the same forum i.e. before the Court of the learned Magistrate. The learned Magistrate has considered all relevant factors under the said Act of 1986 and has fixed just and fair amount of compensation.

6. Hence, there is no merit in the Petition and the same is dismissed .

7. The Respondent No.1 is permitted to withdraw sum of Rs.01,50,000/- deposited by the Petitioner in this Court.

JUDGE